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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210 and 225

[FNS-2013-0026]

RIN 0584-AD84

Simplified Cost Accounting and Other Actions to Reduce Paperwork in the Summer Food Service Program

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the Summer Food Service Program (SFSP) regulations to incorporate statutory changes mandated by Section 738 of the Consolidated Appropriations Act, 2008, which extends simplified cost accounting and reporting procedures to SFSP sponsors in all States, and eliminates the cost comparison requirements for determining payments to sponsors. In addition, this rule makes several discretionary changes to improve administrative efficiency and reduce paperwork in the management of the SFSP. Finally, this rule amends the National School Lunch Program regulations to create consistency among the Child Nutrition Programs with regard to notice procedures. The intended effect of this rule is to simplify and streamline Program administration while ensuring Program integrity.

DATES: Effective Date: This rule is effective [INSERT 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Implementation Date: State agencies and Summer Food Service Program sponsors must implement the provisions of this rule no later than January 1, 2019.

FOR FURTHER INFORMATION CONTACT: Andrea Farmer, (703) 305-2470.

SUPPLEMENTARY INFORMATION:

I. Background

The Summer Food Service Program (SFSP) is authorized under Section 13 of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1761. The primary purpose of the Program is to provide free, nutritious meals to children in low-income areas during periods when schools are not in session. FNS has made strides to ensure that those in need have food to eat and to streamline Program operations. SFSP serves not only the neediest children, but also functions as an opportunity for local leaders and business owners to serve their community. Summer Meal Programs can be operated in a variety of settings and should focus on the needs of diverse communities. Because of this, the types of participating Program sponsors vary widely – from Federal agencies, to local governments, school districts, and small nonprofit community organizations.

This final rule codifies the nondiscretionary simplified cost accounting and reporting procedures established in the Consolidated Appropriations Act, 2008 (Public Law 110-161). These simplified cost accounting procedures were originally authorized in the Consolidated Appropriations Act of 2001 and were piloted in fourteen states from 2001-2004. Section 18(f) of the Child Nutrition and WIC Reauthorization Act of 2004 (Public Law 108-265) made the

simplified cost accounting procedures permanent for eligible States. Six new States in addition to the original fourteen States were determined eligible. The Consolidated Appropriations Act, 2008 extended the simplified procedures to all sponsors in all States.

This final rule also makes discretionary changes to the SFSP regulations to improve management of the Program and reduce paperwork requirements for program operators. The purpose of the simplified procedures is to facilitate and encourage participation by eligible sponsors, in turn providing access to those in need in the summer months and other times during the year when they do not have access to school meals.

The regulatory changes to the reimbursement procedures will align Program regulations with current policy FNS issued in 2008 to implement statutory changes, SFSP 01-2008, *Nationwide Expansion of Summer Food Service Program Simplified Cost Accounting Procedures*, January 2, 2008. This policy guidance implemented the elimination of the cost comparison to determine reimbursements, the establishment of a reimbursement rate of “meals times rate” without comparison to actual or budgeted costs, and the requirement that sponsors maintain records of their costs for State agency review, rather than report their costs to the State agency.

The intent of this rulemaking is to simplify the SFSP for State agencies, sponsors, and site operators while providing a quality meal service to children and maintaining integrity of the Program. The proposed rule was published in the Federal Register (78 FR 41857) on July 12, 2013, seeking to codify changes to cost accounting practices as well as make changes to improve the efficiency and effectiveness of the Program and reduce administrative paperwork. The

majority of provisions in the proposed rule codify the existing policies and guidance already being implemented in the SFSP nationwide:

- Extend simplified cost accounting and reporting procedures to SFSP sponsors in all States and eliminate the cost comparison requirements for determining payments to sponsors.
- Require sponsors to utilize unused reimbursement to improve the Program, or pay allowable costs of other Child Nutrition Programs operated by the sponsor.
- Provide State agencies the flexibility to exempt school food authority sponsors from submitting a separate budget when applying to operate SFSP, provided that operation of SFSP was included in their annual budget for operation of the National School Lunch Program.
- Require sponsors to maintain documentation confirming the operation of a nonprofit food service.
- Establish the responsibilities of State agencies when reviewing a sponsor's operation under simplified procedures, including suggestions for monitoring of the nonprofit food service.
- Encourage State agencies to provide technical assistance to sponsors to utilize unused reimbursements to improve the meal service, improve Program management, or pay allowable costs of other Child Nutrition Programs operated by the sponsor if significant unused reimbursements are found during a sponsor review.
- Allow more alternatives for sponsors to combine claims for reimbursement.
- Allow sponsors to renew contracts for up to four years, to reduce paperwork and increase the sponsors' negotiating power to get higher quality meals at a better price.

- Clarify the administrative oversight role of sponsors at meal service sites.
- Provide consistent notification and simplified acquisition threshold requirements across Child Nutrition Programs.

II. Public Comments and FNS Response

FNS appreciates the insightful comments provided by stakeholders and the public. Twenty-two comments were received from a cross section of SFSP administrators, SFSP operators, and advocates. Commenters included representatives of State Departments of Education, food banks, and nonprofit organizations supporting anti-hunger efforts, summer learning, and afterschool programs. Seven State administering agencies, four SFSP sponsors, and 11 advocacy organizations submitted comments on the proposed rule. It should be noted that 22 comments represent a very small portion of the vast number of SFSP stakeholders. To view all of the public comments on the proposed rule, go to www.regulations.gov and search for public submissions under docket number FNS-2013-0026.

Of the 22 comments received, 19 voiced general support for the implementation of the simplified cost accounting amendments, the clarification of the sponsor's responsibility for oversight at meal sites, and the amendment of the threshold for small purchases, and offered thoughtful suggestions for improvements to strengthen the rule and provide more clarity on certain sections.

Some commenters specifically voiced concern regarding the proposed changes to the collection of excess funds, approval of applications, review of nutrition quality, and monitoring of sponsor budgets and nonprofit food service. These commenters expressed concern that the proposed changes could compel State agencies to reinstate administrative practices that had been required for cost accounting, prior to the 2008 law and publication of subsequent implementing guidance. Additionally, a few commenters expressed concern that several of the provisions regarding State agency monitoring would create undue burden on the administering State agencies and sponsors and might discourage participation. Several commenters also requested clarity and guidance on a number of the provisions, particularly State agency monitoring of sponsors and operation of a nonprofit food service.

The following is a summary of the public comments by provision. In some instances, several provisions are grouped together under the same topic area because the provisions and comments received are related:

a. Simplified Cost Accounting and Reporting

7 CFR 225.9(c), 7 CFR 225.9(d)(7), 7 CFR 225.9(d)(8)

Proposed Rule:

The proposed rule would codify the practice of using a combined operating and administrative reimbursement of “meals times rates” for all sponsors, and eliminate cost comparison requirements at 7 CFR 225.9(d)(7) and (8). The proposed rule would also streamline the process for calculating advances under 7 CFR 225.9(c) by no longer differentiating between operating and administrative advances. As required by legislative action, FNS updated its policy guidance to provide for implementation of a combined reimbursement nationwide.

Regulations at 7 CFR 225.9(c) provide a framework for advancing payments to sponsors, while 7 CFR 225.9(d)(7) and (8) require State agencies to reimburse participating sponsors on a per-meal basis for meals meeting Program requirements. Prior to the implementation of the pilot and the subsequent extension of the simplified cost accounting procedures to all States and sponsors, sponsors received reimbursement separately for both operating costs and administrative costs.

Comments:

There was unanimous support from all commenters who commented on these specific provisions. Several of the commenters offered recommendations to create more flexibility within this provision by allowing State agencies to determine the percentage of the advance that is given to sponsors. Other commenters suggested additional training for school food authorities (SFA).

FNS Response:

The changes to 7 CFR 225.9(d)(7) and (8) to eliminate cost comparison requirements, as proposed, are finalized in this rule. In response to commenters' request for more flexibility for State agencies to determine the percentage of advance payments, we must clarify that FNS does not have the statutory authority to amend those requirements. The requirements to provide service institutions with advance payments as well as the determined percentages of advance payments are codified at Section 13(e)(1) and (2) of the NSLA and do not provide the discretion FNS would need to amend the requirements for advance payments. However, the regulations at 7 CFR 225.9(c)(3) (this rulemaking amends citation to 7 CFR 225.9(c)(2)) do provide some flexibility to the State agency to "make the best possible estimate based on the sponsor's request and any other available data" when determining the amount of the advanced payment. State agencies should work with sponsors, especially those sponsors that are operating the Program for the first time, as they develop their request for advance payments.

In current regulations, State agencies already have the discretion to require more training for SFAs. Therefore, FNS maintains that the proposed language provides State agencies with the flexibility to require additional training. However, in order to provide clarity, FNS intends to issue additional guidance on administration of advances as deemed necessary.

Accordingly, the changes to 7 CFR 225.9(d)(7) and (8) and (c) as proposed are finalized in this rule. They eliminate the cost comparison requirements, combine operating and administrative reimbursements into a single “meals times rates” reimbursement, and combine operating and administrative advances. In addition, references to operating and administrative costs were removed throughout 7 CFR 225.9.

b. Budget Submissions

7 CFR 225.6(b)(7)

Proposed Rule:

The proposed rule would amend 7 CFR 225.6(b)(7) to allow State agencies to exempt SFA sponsors that participated in the SFSP in the previous year and had no documented serious problems managing the SFSP or National School Lunch Program (NSLP) from the annual budget submission requirement.

Prior to publication of the proposed rule, FNS issued policy guidance (SFSP 01-2008, *Nationwide Expansion of Summer Food Service Program Simplified Cost Accounting Procedures*, January 2, 2008 and SFSP 03-2008, *Simplified Procedures in the Summer Food Service Program*, February 14, 2008) that provided State agencies with the flexibility to exempt certain sponsors from the requirement to submit budgets annually with their applications for participation as specified in 7 CFR 225.6(c)(2)(ii)(B) and (c)(3)(ii)(B) and to receive start-up or advance payments as specified in 7 CFR 225.9(a) and (c)(2)(i).

The proposed changes would have brought the regulations in line with exemptions currently available nationwide.

Comments:

Of the five unique comments received on this provision, two supported, one opposed, and two provided recommendations for clarifying and streamlining the process to reduce administrative burden on sponsors. One commenter recommended allowing State agencies to exempt SFA sponsors, who participated successfully in *any* Child Nutrition Program (including NSLP, School Breakfast Program (SBP), and Seamless Summer Option (SSO)) in the prior year, from the annual budget submission requirement. The commenter that opposed this provision expressed that “successful” was too vague a term and requested additional criteria for identifying a successful operation. The opposing commenter also identified the budget submission as a necessity in order to determine the nonprofit food service status of sponsors.

FNS Response:

The proposed changes to the budget submission process were intended to align regulations with implemented national flexibility to allow States to exempt certain sponsors from the requirement. This flexibility dates back to the original simplified cost accounting pilot first started in 2001. However, these provisions are not consistent with statutory changes made in the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111-296). Amendments to Section 13(b)(3) of the NSLA revised budget submission requirements to specify that “when applying for participation in the program, and not less frequently than

annually thereafter, each service institution shall submit a complete budget for administrative costs related to the program, which shall be subject to approval by the State.” Based on the legislative amendments to Section 13 of the NSLA, all sponsors, without exception, applying to participate must submit a complete budget for administrative costs related to the Program.

FNS has received consistent feedback from stakeholders that budget submissions are a useful tool for maintaining Program integrity. The budget review process provides the opportunity to identify unallowable costs and helps ensure that funds are used only for allowable costs. Maintaining a requirement for State agencies to annually review budgets allows SFA sponsors to receive important feedback on the allowability of planned expenditures.

However, FNS recognizes that submitting a separate budget for SFSP would be duplicative for SFAs that have already submitted budget information as part of their operation of another Child Nutrition Program. In an effort to reduce administrative and paperwork burden, State agencies may exempt SFAs applying to operate the SFSP from submitting a separate budget to the State agency, provided that operation of the SFSP is included in the annual budget submitted for the NSLP.

Accordingly, the proposed changes to budget submission requirements are not included in the final rule and the requirement at 7 CFR 225.6(b)(7) that sponsors must submit budgets when they apply for participation in the SFSP is maintained. In addition, the final rule adds at 7 CFR 225.6(b)(7) State agency discretion to exempt SFAs from submitting a separate budget provided that operation of the SFSP is included in the annual budget submitted for the NSLP.

c. Maintaining a Nonprofit Food Service

7 CFR 225.12(a), 7 CFR 225.15(a), 7 CFR 225.15(c)

The proposed rule touched on several sections of the regulations relating to maintenance of a nonprofit food service, including sections on claims against sponsors and management responsibilities of sponsors.

Proposed Rule:

The proposed rule would amend 7 CFR 225.15(a)(4) to require sponsors to maintain documentation confirming the operation of a nonprofit food service. The proposed rule would also clarify 7 CFR 225.12(a) and 225.15(c)(1), which restrict the use of SFSP reimbursements on allowable costs only and require that sponsors' records include all costs associated with the meal service and document that all costs are allowable.

Regulations found at 7 CFR 225.6(e)(1) require sponsors to maintain a nonprofit food service. Regulations at 7 CFR 225.12(a) and 225.15(a) and (c) outline the requirements for maintaining a nonprofit food service in the SFSP. Sponsors that operate multiple

Child Nutrition Programs on a year-round basis are not required to maintain a separate nonprofit food service account for the SFSP. The Consolidated Appropriations Act of 2008, which expanded the simplified cost accounting procedures, also amended statutory requirements for maintaining a nonprofit food service. FNS provided guidance on what is required to document the maintenance of a nonprofit food service under the legislative changes via policy memorandum (SFSP 01-2008, *Nationwide Expansion of Summer Food Service Program Simplified Cost Accounting Procedures*, January 2, 2008).

Comments:

FNS received eight unique comments on the topic of maintaining a nonprofit food service. Three of the eight comments opposed the provision, two proposed recommendations for clarity, and one expressed concern that this provision could eventually result in USDA requiring end-of-year operating statements. Commenters expressed concern that FNS was establishing a requirement that sponsors report costs to the State agency on a routine or annual basis. Similarly, commenters recommended clarifying the language to ensure that sponsors do not have to report their costs to the State agency on an annual basis. Commenters also recommended codifying the language used in the January 2008 guidance, which said that sponsors “must be able to document” their nonprofit food service.

FNS Response:

The intent of this provision is consistent with the January 2008 guidance, which requires that sponsors be able to document that they have maintained a nonprofit food service. It is not the intent of this provision to require sponsors to submit cost records to the State agency on a routine or annual basis. As noted in that guidance, sponsors may meet this requirement by retaining records of all revenues received and expenses paid from the nonprofit food service account. This requirement does not include submitting records to the State agency on a routine or annual basis. However, FNS expects that sponsors will maintain documentation to support their operation of a nonprofit food service to ensure the integrity of the Program. This documentation permits the sponsor, reviewers, and auditors to evaluate and verify during a review that the SFSP was operated on a nonprofit basis. State agencies are responsible for informing sponsors that expenses paid from the nonprofit food service account must be allowable costs that are necessary, reasonable, and properly documented. Accordingly, FNS will amend 7 CFR 225.12(a) and 225.15(a)(4) and (c)(1) to retain the language to maintain documentation of a nonprofit service account in the final rule as it was proposed.

d. Collection of Excess Funds

7 CFR 225.9

Proposed Rule:

As proposed, this provision would add a paragraph to 7 CFR 225.9 to require sponsors to use “excess funds” (reimbursements exceeding allowable costs) to improve the meal service or management of the program. The provision also would allow sponsors to use remaining funds at the end of the Program year to be used to pay allowable costs of other Child Nutrition Programs.

The provision went further to require excess funds to be collected from sponsors that do not operate at least one other Child Nutrition Program and do not plan to participate in the SFSP in the following year. At the time the proposed rule was published, the only requirements for collection of excess funds in SFSP regulations were found at 7 CFR 225.9(c)(7) and referred to collection of funds in excess of advanced payments.

Comments:

Of the six unique comments received, two opposed the provision, two offered recommendations, one expressed concern, and one supported the changes. Those who opposed the provision stated that it would increase administrative burden on the States and sponsors. In addition, commenters believed that collecting excess funds would make it difficult for sponsors to improve Program operations and would discourage participation. Ten commenters noted that the proposed changes were not supported by the Consolidated Appropriations Act of 2008 (Public Law 110-161), which extended the simplified cost accounting procedures to all sponsors and therefore entitles all sponsors to the maximum reimbursement, as long as the sponsor is meeting the program requirements, including serving meals that meet the Federal nutrition standards.

FNS Response:

FNS appreciates the comments received on the effectiveness of collecting excess funds and challenges associated with the implementation of this provision. Upon further review, FNS has determined that the proposed rule and guidance issued following the publication of the proposed rule did not accurately represent the intent of the provision. The regulatory language in the proposed rule, which would have required the State agency to collect “excess funds” (meaning both reimbursements in excess of costs and advance payments in excess of reimbursement) at the end of each summer of Program operations, was overly broad and could create undue burden on both the State agency and sponsors. Additionally, by preventing sponsors from retaining funds at the end of Program operations, sponsors would be unable to take necessary steps between operating times to improve meal service during operation. FNS also recognizes the need for clarity when discussing excess funds and seeks to alleviate the confusion caused by the proposed rule and subsequent guidance.

Under the simplified cost accounting procedures, FNS issued guidance on how to manage excess funds in the SFSP. However, FNS did not clearly define the term “excess funds.” There is an important distinction between *excess funds* and *unused reimbursement* that needs to be explained.

FNS defines excess funds, for Program purposes, as the difference between any advance funding and reimbursement funding, when advance funds received by a sponsor are

greater than the reimbursement amount earned by a sponsor. This distinction is statutorily established in Section 13(e)(1) of the NSLA, 42 U.S.C. 1761(e)(1), which states that “Not later than June 1, July 15, and August 15 of each year, or, in the case of service institutions that operate under a continuous school calendar, the first day of each month of operation, the State shall forward advance program payments to each service institution...” Further, in Section 13(e)(2), the NSLA provides that, “[p]rogram payments advanced to service institutions that are not subsequently deducted from a valid claim for reimbursement shall be repaid upon demand by the State. Any prior payment that is under dispute may be subtracted from an advance program payment.” This requirement is also codified in current regulations at 7 CFR 225.9(c)(7).

While there is, similarly, a statutory directive in Section 13(e)(2) of the NSLA requiring the collection of excess funds, as described above, there is no such statutory directive, or intent, to collect unused reimbursements.

So, an example of *excess funds* would be if a sponsor requested \$1,000 in advance funding and only claimed \$900 in meal reimbursement; the sponsor would have \$100 in excess funds that cannot be used in other Child Nutrition Programs. The State agency has the statutory and regulatory authority to recover the \$100 in excess funds at the end of Program operations for which the advance was paid.

In contrast, FNS defines *unused reimbursements* differently than excess funds. Unused reimbursements are the difference between the amount claimed for reimbursement and actual costs, should reimbursement exceed costs. For example, if a sponsor received

\$1,000 in meal claim reimbursement but only spent \$900 on actual costs to operate the Program, the sponsor would have \$100 in unused reimbursement.

FNS expects States and sponsors to adequately manage resources, so that a well-run, quality summer meal service does not result in a significant amount of unused reimbursement. It is incumbent on sponsors and State agencies to monitor program operations throughout the summer and for sponsors to make adjustments to ensure that quality meals are being served. However, should a sponsor have unspent reimbursement, this remaining amount must be kept in a nonprofit food service account, as required of all Child Nutrition Programs. These funds must benefit the operation of another Child Nutrition Program operated by the sponsor or SFSP operations operated by the sponsor the following Program year. If a sponsor does not return to participate in SFSP and does not operate any other Child Nutrition Programs, the sponsor is not required to return the unused reimbursement. As noted by commenters, this is in keeping with the intent of the statute which entitles all sponsors to the maximum reimbursement, as long as the sponsor is meeting the program requirements.

Additionally, in order to address the issue of treating sponsors remaining in the Program differently than sponsors not intending to participate in the following year, FNS would like to highlight the regulatory requirements at 7 CFR 225.6(e)(1)(i) that sponsors must enter into a permanent agreement with the State agency, in which they must agree to operate a nonprofit food service during the period specified. Therefore, those sponsors remaining in the Program must continue to operate a nonprofit food service in order to be in compliance with regulations and not be in violation of the Sponsor-State agreement. This means that should a sponsor have unused reimbursement, it must be used to improve the Program or for allowable costs in other Child Nutrition Programs operated by the sponsor. In contrast, a sponsor that chooses not participate in the Program no longer has an agreement with the State agency and is not required to operate a nonprofit food service.

Since 2008, consistent with statutory direction in Section 13 of the NSLA, FNS has made the distinction between excess funds and unused reimbursement in order to protect the integrity of program operations by ensuring that sponsors are only permitted to retain funds that are payment for meals served to children through the SFSP. It is important to remember that under simplified cost accounting procedures, unused reimbursements are not returned to the State agency unless unallowable meals were claimed for reimbursement. State agencies are always permitted to conduct closeout audits or reviews to determine if all meals claimed were valid and that Program funds were spent on allowable costs only.

FNS encourages this oversight activity, particularly when the State agency has concerns about how the sponsor operated the Program.

If unallowable costs are identified during a closeout review or audit, the State agency should follow appropriate audit resolution procedures, although no funds would be recovered. If a sponsor will not operate SFSP in the future, but currently operates another Child Nutrition Program, the sponsor would be required to restore the misspent SFSP funds to its nonprofit food service account. In cases where the organization does not intend to participate in the SFSP in the future and does not currently participate in any other Child Nutrition Programs, the State agency should notify the sponsor of the findings and retain documentation of the findings on file. If the organization applies for participation in any Child Nutrition Program in the future, the State agency should ensure the organization has proper controls in place to prevent a recurrence of the improper expenditures of nonprofit food service account funds. This is consistent with longstanding Department policy, issued during the implementation of the simplified cost accounting procedures (SFSP 01-2008, *Nationwide Expansion of Summer Food Service Program Simplified Cost Accounting Procedures*, January 2, 2008).

Therefore, the final rule retains the current requirement that *excess funds*, defined as the difference between any advance funding and reimbursement funding, when advance funds received by a sponsor are greater than the reimbursement amount earned by a sponsor, must be returned to the State agency at the end of program operations, even if the sponsor plans to return to the Program the following year. The final rule additionally

clarifies that *unused reimbursement* may be retained by the sponsor. If the sponsor plans to return to the Program the following year, the unused reimbursement must be maintained in the sponsor's nonprofit food service account and must be put toward the operation of another Child Nutrition Program or for SFSP operations the following summer. FNS has issued guidance instructing sponsors to utilize unused reimbursement for the improvement of the meal service or management of the Program or to use the funds for allowable costs in other Child Nutrition Programs.

Accordingly, this final rule adds definitions of "Excess funds" and "Unused reimbursement" under 7 CFR 225.2 and clarifies what sponsors should do with unused reimbursement under a new paragraph at 7 CFR 225.9(g). The final rule will retain the requirement for sponsors to utilize unused reimbursement to improve the Program, or for allowable costs in other Child Nutrition Programs and will not codify the proposed requirement to collect unused reimbursement from sponsors.

e. State Agency Monitoring

7 CFR 225.7

In order to maintain the integrity of Program operations, it is critical that State agencies and sponsors practice sound Program management. The proposed rule would change several provisions to provide additional requirements that would ensure thorough reviews of program operations. These changes expanded upon requirements for State agencies to establish financial management systems and standards for sponsor recordkeeping found at 7 CFR 225.7(d). In general, one commenter opposed the changes and one offered a

recommendation. The commenter who opposed the provision believed that the procedures were too prescriptive and would increase the administrative burden for both sponsors and States. Another commenter offered the recommendation to provide additional funding and training to help States develop additional systems needed to support this requirement. Several commenters offered more detailed comments on the specific provisions, as discussed below.

7 CFR 225.7(d)(2)(iii)(A):

Proposed Rule:

The proposed rule would require State agencies to determine if a sponsor provides a nutritious, high quality food service.

Comments:

Two commenters supported the provision, while several others offered recommendations to provide additional guidance on what defines a nutritious, high quality food service.

FNS Response:

FNS agrees with commenters that including a review of “nutritious, high quality food” is vague and should not be codified in the regulations. FNS has issued additional guidance on operating a high quality meal service to ensure that sponsors are providing the best possible meals to children and that State agencies have the resources to support sponsors in serving high quality meals following the publication of this rule. FNS encourages State agencies and sponsors to review the overall quality of the meal service. Accordingly, this provision is absent from the final rule.

7 CFR 225.7(d)(2)(iii)(B):

Proposed Rule:

The proposed rule would have required State agencies to determine if expenditures are allowable and consistent with FNS Instructions and guidance.

Comments:

Two commenters offered support and requested additional guidance to define what is allowable.

FNS Response:

FNS agrees with commenters that additional guidance is necessary for this provision. FNS has issued Instruction 796-4 that clearly outlines what costs are considered allowable in the SFSP. Accordingly, FNS has codified at 7 CFR 225.7(d)(2)(iii)(A) that the State agency should determine if expenditures are allowable and consistent with FNS

Instructions and guidance and all funds accruing to the food service are properly identified and recorded as food service revenue.

7 CFR 225.7(d)(2)(iii)(C):

Proposed Rule:

The proposed rule would require State agencies to determine if expenditures are consistent with expenditures of comparable sponsors.

Comments:

Three State agencies opposed the part of the provision that requires a comparison to similar sponsors, saying that it is not a reasonable request for State agencies as they do not have the resources to conduct such a comparison and it would be technically difficult for States to accomplish.

FNS Response:

FNS recognizes that comparing the expenditures of similar sponsors would be unnecessarily burdensome on the State agencies. State agencies should be aware of what reasonable costs of similarly sized sponsoring organizations would be; however, a formal comparison is not required. Accordingly, FNS has clarified in the codified language at 7 CFR 225.7(d)(2)(iii)(B) that State agencies should determine if expenditures are consistent with budgeted costs and previous year's expenditures.

7 CFR 225.7(d)(2)(iii)(D):

Proposed Rule:

The proposed rule would require State agencies to determine if sponsor reimbursements have resulted in accumulation of net cash resources as defined in 7 CFR 225.7(f).

Comments:

One commenter expressed support but also concern for how State agencies would be able to distinguish the difference when evaluating combined accounts.

FNS Response:

State agencies must establish a system for monitoring and reviewing a sponsor's nonprofit food service accounts to ensure that the sponsor has not accumulated net cash resources over the limits as defined in 7 CFR 225.7(f). FNS expects that this knowledge will be developed through the review process. As mentioned in the discussion on excess funds and unused reimbursement, accumulations of net cash resources should be closely monitored by sponsors and State agencies to ensure resources are being appropriately managed. Accordingly, FNS has codified at 7 CFR 225.7(d)(2)(iii)(C) that State agencies should determine that reimbursements have not resulted in accumulation of net cash resources.

7 CFR 225.7(d)(2)(iii)(E):

Proposed Rule:

The proposed rule would require State agencies to determine if the level of administrative spending is reasonable.

Comments:

One commenter recommended providing specific guidance for determining when spending is reasonable. Another commenter opposed the provision, saying that it goes against the elimination of the distinction between operating and administrative reimbursements and would place an administrative burden on State agencies.

FNS Response:

State agencies should be able to determine what is reasonable spending and ensure that sponsors are using reimbursements for administrative costs in a manner that is consistent with the operation of a nonprofit food service. Accordingly, FNS retains the proposed provision and codifies it at 7 CFR 225.7(d)(2)(iii)(D).

7 CFR 225.7(d)(2)(iii)(F):

Proposed Rule:

The proposed rule would require State agencies to determine if there are any other issues identified by reviewers and whether these issues are being managed appropriately.

Comments:

No commenters responded to this provision.

FNS Response:

As FNS amended the final rule to put forth a list of recommended conditions for State agencies to review, including other identified issues became redundant. Accordingly, this provision is absent from the final rule.

In summary, accordingly, the final rule removes the requirements at 7 CFR 225.7(d)(2)(iii) that the State agency review the specific aspects of sponsor operations listed in the regulatory text and instead provides a list of Program management issues for potential review by the State agency at 7 CFR 225.7(d)(2)(iii)(A) through (D).

7 CFR 225.7(f)

Proposed Rule:

The proposed rule would have added additional requirements at 7 CFR 225.7(f) that the State must establish a system to monitor and review the sponsor's nonprofit food service to ensure that Program reimbursement funds are being used solely to conduct the food service operation. Under the proposed rule, the State must also ensure that sponsors do not have net cash resources totaling more than three months' average expenditures in their nonprofit food service accounts.

The addition of § 225.7(f), as proposed, would have codified that certain corrective actions may be necessary to improve food service quality under the following conditions:

- The sponsor's net cash resources exceed three months' average expenditures for the sponsor's nonprofit food service or such other amount as may be approved in accordance with the paragraph;
- The ratio of administrative to operational costs (as defined in 7 CFR 225.2) is high as compared to similar sponsors;
- There is significant use of alternative funding for food and/or other costs; or
- A significant portion of the food served is privately donated or purchased at a very low price.

Comments:

On the criteria required for State agencies to review sponsor nonprofit food service, several commenters opposed portions of this section, specifically the requirement to use the three month cap on cash resources, the comparison between sponsors, the ratio of administrative to operating costs, the significant use of alternative funds to determine the quality of the nonprofit food service and the requirement for States to take corrective action should sponsors fall under any of these indicators. Commenters preferred these indicators to be considered but not required.

FNS Response:

FNS appreciates the responses from various stakeholders expressing concern about the proposed changes to require corrective action to improve food service quality under prescribed conditions. While the intent of this rule is to streamline Program operations and decrease the administrative burden for both States and sponsors, FNS must also ensure the integrity of the Program. FNS agrees with commenters that due to the short duration of summer meal programs, a net cash resource limit of three months' average expenditures may be considered too high. FNS recognizes that the prescriptive language proposed could add increased burden or unfairly target certain organizations that run quality programs but still meet the conditions specified in the proposed rule. For example, a food pantry might have a higher ratio of administrative costs to operating costs and have significant use of alternative funds. Under the proposed rule, the food pantry might have been subject to a higher level of scrutiny based on the criteria set forth, despite operating a high quality meal service.

Accordingly, due to the short duration of the Program, the final rule includes a limit of one month's net cash resources for sponsors that operate during the summer months but retains the three month limit for sponsors that operate Child Nutrition Programs year round at 7 CFR 225.7(f). Additionally, the final rule retains the conditions State agencies should review, as proposed, but rather than requiring a review of these conditions, encourages States to use these conditions as indicators of potential Program mismanagement.

7 CFR 225.11(f)(1)

Proposed Rule:

The proposed rule sought to add to requirements at 7 CFR 225.11(f)(1) to direct the State agency to require the sponsor to implement appropriate corrective action if it is determined during a review that the sponsor was not providing a high quality meal service. The proposed rule outlined in the proposed changes to 7 CFR 225.7(f) how the State agency would make the determination if corrective action was necessary.

Comments:

In response to the additional requirement for State agencies to require corrective action to improve the meal service if a sponsor is found to be operating a program with poor quality food service, six commenters either opposed or recommended additional guidance. Of the six commenters, four State agencies expressed concern that the guidance was too vague and they would not be able to effectively determine what constitutes a poor quality meal service.

FNS Response:

FNS agrees with commenters that requiring corrective action for poor quality meal service is too vague and requires more guidance. Accordingly, the final rule removes the requirement for corrective action if a sponsor is determined to be operating a poor quality meal service and is operating below the reimbursement level, and instead adds a new paragraph at 7 CFR 225.11(g) that recommends that States provide technical assistance to sponsors in these circumstances. However, if State agencies observe violations during a

review, they should act immediately, due to the short duration of summer program operations.

f. Small Purchase Procedures

7 CFR 225.15(m)

Proposed Rule:

The proposed change would remove reference to the outdated small purchase threshold (referred to as simplified acquisition threshold in 2 CFR part 200 and throughout the remainder of this final rule) of \$10,000 and allow State and local agencies to use the simplified acquisition threshold for small purchases up to the threshold set by 2 CFR part 200.

Comments:

FNS received five unique comments. Of these, three supported the provision, one commenter partially supported and partially opposed the provision, and one commenter offered a recommendation for improving the bid bond requirements. Commenters generally supported aligning the requirements for small purchase procedures with those already at 2 CFR part 200. One State agency opposed the requirement that all bids be submitted to the State agency for approval before acceptance, and that these bids are responded to within five working days of receipt, claiming that this would create a burden on the State agency.

Commenters also expressed concern that the bid bond requirements should be left to the discretion of the sponsor, as the new requirements might pass additional costs from Food Service Management Companies (FSMC) to the sponsor.

FNS Response:

FNS appreciates the support for aligning the requirements for small purchase procedures with those already in Federal Regulations. The purpose of this provision is to align SFSP regulations with broader Federal requirements. Aligning the requirement with 2 CFR part 200 allows for periodic adjustments in the dollar value when the periodic adjustment occurs and relieves FNS of the requirement to change the dollar amount in the Program regulations. Some commenters provided responses to portions of the provisions that did not contain proposed changes, specifically the comments related to the State agency responsibilities regarding bids and sponsor discretion in determining the amount of the bid bond. While FNS appreciates these comments, this final rule will only address the alignment of the simplified acquisition threshold. Accordingly, the final rule aligns regulations at 7 CFR 225.15(m)(4) through (6) with the simplified acquisition threshold with current Federal regulations at 2 CFR part 200.

g. FSMCs and Procurement Standards

7 CFR 225.6(h)(2), 7 CFR 225.6(h)(7):

Proposed Rule:

The proposed rule sought to remove the existing limit of \$10,000 in aggregate for food service management companies, and instead link the standard contract threshold to 2 CFR part 200. This change would help ensure that the standard contract threshold in SFSP is adjusted regularly in accordance with the thresholds applied to the other Child Nutrition Programs. The proposed rule would apply this threshold to individual contracts, rather than aggregate contracts.

The proposed rule also offered changes to 7 CFR 225.6(h)(7) to make SFSP requirements consistent with NSLP requirements that pertain to food service management companies. The changes would allow sponsors to enter into annual contracts that may be renewed annually for up to four additional years. The rule also proposed that all contracts in excess of \$10,000 contain clauses for termination for both cause and convenience with 60-day notification.

Comments:

FNS received eight unique comments regarding FSMCs and Procurement Standards, with four commenters supporting the provision, two commenters opposing the term for contract termination and two commenters offering recommendations for improving the rule consistent with preferred practice. Due to the short length of the Program, some commenters felt that a 60-day notification of termination was too long. Commenters recommended that a 30-day notification period would be better suited for the Program.

FNS Response:

FNS recognizes that the Program has certain time constraints and that making the procurement standards consistent with NSLP might be impractical for sponsors.

Accordingly, FNS amends 7 CFR 225.6(h)(2) to align the small purchase threshold to 2 CFR part 200. This final rule also adds a new paragraph at 7 CFR 225.6(h)(7) to set a maximum 60-day notification of termination for cause or convenience. The final rule retains language to allow sponsors to enter into annual contracts with FSMCs that may be renewed annually for up to four additional years.

7 CFR 225.17

Proposed Rule:

The proposed rule would include the requirement for allowing all contracts to be terminated for cause or for convenience.

Comments:

Two commenters expressed support for this change. One commenter specifically noted that they supported the change because it did not include the 60-day notification of termination clause contained in the proposed changes to 7 CFR 225.6(h)(7).

FNS Response:

FNS agrees with commenters that this section should not include a 60-day notification of termination clause. Accordingly, the language in the final rule is codified as proposed under a new paragraph at 7 CFR 225.17(f).

h. Administrative Oversight at Approved Meal Service Sites

7 CFR 225.14(d)(3):

Proposed Rule:

The proposed rule sought to clarify sponsors' responsibilities with respect to meal services at the approved meal service sites and emphasizes that sponsors must have "administrative oversight," rather than "direct operational control," of meal services. Current regulations require sponsors to have "direct operational control" of meal service sites, meaning they are responsible for managing site staff, including hiring and determining conditions of employment and termination.

Based on FNS's experience in administering SFSP and in consultation with local, State, and Federal administrators, USDA determined that sponsors find it difficult to comply with the understanding of "direct operational control." Many sponsors deliver meals to recreational sites that are not directly affiliated with or managed by the sponsors, thus they do not have the authority to hire or terminate staff. Instead, these sponsors have control over only the meal service provided at the site and related activities such as training of staff on meal counting and record keeping procedures.

Comments:

FNS received 13 comments touching on this matter, five of which were unique. All commenters expressed support for the change to the provision.

FNS Response:

FNS will retain the proposed language for the final rule. Accordingly, the final rule defines sponsor oversight as “administrative oversight” and will not include direct operational control, at 7 CFR 225.14(d)(3).

i. Options to Submit a Combined Claim

7 CFR 225.9(d)(3)

Proposed Rule:

The proposed rule sought to make optional the requirement for sponsors operating for less than 10 days in the final month of operations to submit a combined claim for the final and immediate preceding month. Additionally, sponsors wishing to submit combined claims would be allowed to consolidate claims for reimbursement and submit a single claim for reimbursement in the following ways:

- Claims for 10 operating days or less in the initial month of operations may be combined with the claim for the subsequent month;
- Claims for 10 operating days or less in the final month of operations may be combined with the claim for the preceding month; and

- Claims for 3 consecutive months may be combined, as long as this combined claim only includes 10 operating days or less from each of the first and last months of Program operations.

Comments:

FNS received four unique comments regarding the option for sponsors to submit a combined reimbursement claim. Two commenters supported the provision while two commenters opposed the provision. Commenters recommended that States be given the discretion to decide how claims were made in order to retain consistent methods.

FNS Response:

The intent of this provision is to streamline the claims process for States and sponsors. The proposed language permits sponsors to submit a combined claim. Therefore, the language that was presented in the proposed rule is retained in the final rule with the addition of language specifying State agency discretion. Accordingly, the final rule amends 7 CFR 225.9(d)(3) to provide States with the flexibility to allow sponsors to submit combined claims for reimbursement.

j. Delivery Notice Requirements

7 CFR 210.18, 7 CFR 225.13

Proposed Rule:

FNS proposed changes that would specify in NSLP and SFSP regulations what constitutes proper delivery and receipt of a notice of action in an effort to be consistent with the regulations in the Child and Adult Care Food Program (CACFP). A notice of

action is considered delivered by certified mail, return receipt, by facsimile, or by email. Neither NSLP nor SFSP have requirements that explain notice and delivery by a State agency or FNS to an institution. FNS proposed this change because some State agencies have been experiencing difficulty in notifying institutions of review findings, required corrective actions, and terminations. By choosing to avoid accepting the State agency's certified mail, non-complying institutions have continued to operate, claim reimbursement, and mismanage the Programs.

Comments:

FNS received three unique comments, all of which supported the provision to make the requirements consistent with CACFP.

FNS Response:

Accordingly, the final rule amends 7 CFR 210.18(i) and 225.13(b)(1) to include delivery notice requirements in NSLP and SFSP, respectively.

III. Procedural Matters

Executive Order 12866, 13563 and 13771

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting

flexibility. This final rule has been determined to be not significant by the Office of Management and Budget (OMB) in conformance with Executive Order 12866. Therefore, this rule has not been reviewed by OMB. No Regulatory Impact Analysis is required. Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and provides that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. FNS considers this rule to be an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this final rule would not have a significant impact on a substantial number of small entities. This rule will streamline cost accounting procedures so that more time and resources may be directed toward increasing access, providing quality meal service to benefit eligible children, and ensuring Program integrity. While this rule will impact school food authorities, non-profit organizations, and local governments that choose to participate, its implementation will not have significant economic impact on any of those entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and the private sector.

Under section 202 of the UMRA, USDA generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires USDA to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule. This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The Summer Food Service Program is listed in the Catalog of Federal Domestic Assistance Programs under 10.559. The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance Programs under 10.555. Both of these Child Nutrition Programs are subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. Since Child Nutrition Programs are State-administered, FNS has formal and informal discussions with State and local officials, including representatives of Indian Tribal Organizations, on an ongoing basis regarding program requirements and operation. This provides FNS with the opportunity to receive regular input from program administrators which contributes to the development of feasible program requirements.

Executive Order 13132, Federalism

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121. USDA has considered the impact of this final rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. Appeal procedures are set forth at 7 CFR 225.13.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with USDA Regulation 4300-4, "Civil Rights Impact Analysis," to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex, or disability. After a careful review of the rule's intent and provisions, FNS has determined that this rule is not expected to

limit or reduce the ability of protected individuals to participate in the Summer Food Service Program or the National School Lunch Program.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. FNS has assessed the impact of this rule on Indian tribes and determined that this final rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175. If a Tribe requests consultation, FNS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress. FNS is unaware of any current Tribal laws that could be in conflict with this rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency before they can be implemented. Commenters are not required to respond to any collection of information unless it displays a current valid OMB control number. This rule does not contain information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

USDA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 210

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 225

Food assistance programs, Grant programs — health, Infants and children, Labeling, Reporting and recordkeeping requirements.

Accordingly, 7 CFR parts 210 and 225 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

1. The authority citation for 7 CFR part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

2. In §210.18, remove the last two sentences of paragraph (i)(3) and add, in their place, four sentences to read as follows:

§210.18 Administrative reviews.

* * * * *

(i) * * *

(3) * * * This notice shall also include a statement indicating that the school food authority may appeal the denial of all or a part of a Claim for Reimbursement or withholding payment and the entity (i.e., FNS or State agency) to which the appeal should be directed. The notice is considered to be received by the school food authority when it is delivered by certified mail, return receipt (or the equivalent private delivery service), by facsimile, or by e-mail. If the notice is undeliverable, it is considered to be received by the school food authority five days after being sent to the addressee's last known mailing address, facsimile number, or e-mail address. The State agency shall notify the school food authority, in writing, of the appeal procedures as specified in paragraph (p) of this section for appeals of State agency findings, and for appeals of FNS findings, provide a copy of §210.29(d)(3).

* * * * *

PART 225—SUMMER FOOD SERVICE PROGRAM

3. The authority citation for 7 CFR part 225 continues to read as follows:

Authority: Secs. 9, 13 and 14, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a).

4. In §225.2, add definitions of “Excess funds” and “Unused reimbursement” in alphabetical order to read as follows:

§225.2 Definitions.

* * * * *

Excess funds means the difference between any advance funding and reimbursement funding, when advance funds received by a sponsor are greater than the reimbursement amount earned by a sponsor.

* * * * *

Unused reimbursement means the difference between the amount of reimbursement earned and received and allowable costs, when reimbursement exceeds costs.

* * * * *

5. In §225.6:

- a. Amend paragraph (b)(7) by adding a sentence at the end of the paragraph;
- b. Amend paragraph (h)(1) by removing the term “225.15(h)” and adding in its place the term “225.15(m)” and removing the words “of this part”;
- c. Amend paragraph (h)(2) introductory text by revising the second sentence;
- d. Redesignate paragraph (h)(7) as paragraph (h)(8);
- e. Add new paragraph (h)(7); and
- f. Amend newly designated paragraph (h)(8) by removing the term “§225.15(h)(1)” and adding in its place the term “§225.15(m)”.

The revision and additions read as follows:

§225.6 State agency responsibilities.

* * * * *

(b) * * *

(7) * * * State agencies may exempt school food authorities applying to operate the SFSP from submitting a separate budget to the State agency, provided that operation of the SFSP is included in the annual budget submitted for the National School Lunch Program.

* * * * *

(h) * * *

(2) * * * Sponsors that are public entities, sponsors with exclusive year-round contracts with a food service management company, and sponsors that have no food service management company contracts exceeding the simplified acquisition threshold in 2 CFR part 200, as applicable, may use their existing or usual form of contract, provided that such form of contract has been submitted to and approved by the State agency. * * *

* * * * *

(7) The contract between a sponsor and food service management company shall be no longer than 1 year; and options for the yearly renewal of a contract may not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause or for convenience with up to 60-day notification.

* * * * *

6. In §225.7:

- a. Add paragraph (d)(2)(iii);
- b. Add four sentences to the end of paragraph (f); and
- c. Add paragraphs (f)(1) through (4).

The additions read as follows:

§225.7 Program monitoring and assistance.

* * * * *

(d) * * *

(2) * * *

(iii) Review of sponsor's operation. State agencies should determine if:

(A) Expenditures are allowable and consistent with FNS Instructions and guidance and all funds accruing to the food service are properly identified and recorded as food service revenue;

(B) Expenditures are consistent with budgeted costs, and the previous year's expenditures taking into consideration any changes in circumstances;

(C) Reimbursements have not resulted in accumulation of net cash resources as defined in paragraph (f) of this section; and

(D) The level of administrative spending is reasonable and does not affect the sponsor's ability to operate a nonprofit food service and provide a quality meal service.

* * * * *

(f) * * * Additionally, each State agency shall establish a system for monitoring and reviewing sponsors' nonprofit food service to ensure that all Program reimbursement funds are used solely for the conduct of the food service operation. State agencies must review the net cash resources of the nonprofit food service of each sponsor participating in the Program and ensure that the net cash resources do not exceed one months' average expenditures for sponsors operating only during the summer months and three months' average expenditure for sponsors operating Child Nutrition Programs throughout the year. State agency approval shall be required for net cash resources in excess of requirements set forth in this paragraph (f). Based on this monitoring, the

State agency may provide technical assistance to the sponsor to improve meal service quality or take other action designed to improve the nonprofit meal service quality under the following conditions, including but not limited to:

- (1) The sponsor's net cash resources exceed the limits included in this paragraph (f) for the sponsor's nonprofit food service or such other amount as may be approved in accordance with this paragraph;
- (2) The ratio of administrative to operating costs (as defined in §225.2) is high;
- (3) There is significant use of alternative funding for food and/or other costs; or
- (4) A significant portion of the food served is privately donated or purchased at a very low price.

* * * * *

7. In §225.9:

- a. Revise the last sentence of paragraph (a) and paragraphs (c) and (d); and
- b. Add paragraph (g).

The revisions and additions read as follows:

§225.9 Program assistance to sponsors.

- (a) * * * The amount of the start-up payment shall be deducted from the first advance payment or, if the sponsor does not receive advance payments, from the first reimbursement.

* * * * *

(c) Advance payments. At the sponsor's request, State agencies shall make advance payments to sponsors that have executed Program agreements in order to assist these sponsors in meeting expenses. For sponsors operating under a continuous school calendar, all advance payments shall be forwarded on the first day of each month of operation. Advance payments shall be made by the dates specified in paragraph (c)(1)(i) of this section for all other sponsors whose requests are received at least 30 days prior to those dates. Requests received less than 30 days prior to those dates shall be acted upon within 30 days of receipt. When making advance payments, State agencies shall observe the following criteria:

(1) Payments. (i) State agencies shall make advance payments by June 1, July 15, and August 15. To be eligible for the second and third advance payments, the sponsor must certify that it is operating the number of sites for which the budget was approved and that its projected costs do not differ significantly from the approved budget. Except for school food authorities, sponsors must conduct training sessions before receiving the second advance payment. Training sessions must cover Program duties and responsibilities for the sponsor's staff and for site personnel. A sponsor shall not receive advance payments for any month in which it will participate in the Program for less than 10 days. However, if a sponsor operates for less than 10 days in June but for at least 10 days in August, the second advance payment shall be made by August 15.

(ii) To determine the amount of the advance payment to any sponsor, the State agency shall employ whichever of the following methods will result in the larger payment:

(A) The total reimbursement paid to the sponsor for the same calendar month in the preceding year; or

(B) For vended sponsors, 50 percent of the amount determined by the State agency to be needed that month for meals, or, for self-preparation sponsors, 65 percent of the amount determined by the State agency to be needed that month for meals.

(2) Advance payment estimates. When determining the amount of advance payments payable to the sponsor, the State agency shall make the best possible estimate based on the sponsor's request and any other available data. Under no circumstances may the amount of the advance payment exceed the greater of the amount estimated by the State agency to be needed by the sponsor to meet Program costs or \$40,000.

(3) Deductions from advance payments. The State agency shall deduct from advance payments the amount of any previous payment which is under dispute or which is part of a demand for recovery under §225.12.

(4) Withholding of advance payments. If the State agency has reason to believe that a sponsor will not be able to submit a valid claim for reimbursement covering the month for which advance payments have already been made, the subsequent month's advance payment shall be withheld until a valid claim is received.

(5) Repayment of excess advance payments. Upon demand of the State agency, sponsors shall repay any advance Program payments in excess of the amount cited on a valid claim for reimbursement.

(d) Reimbursements. Sponsors shall not be eligible for meal reimbursements unless they have

executed an agreement with the State agency. All reimbursements shall be in accordance with the terms of this agreement. Reimbursements shall not be paid for meals served at a site before the sponsor has received written notification that the site has been approved for participation in the Program. Income accruing to a sponsor's program shall be deducted from costs. The State agency may make full or partial reimbursement upon receipt of a claim for reimbursement, but shall first make any necessary adjustments in the amount to be paid. The following requirements shall be observed in submitting and paying claims:

(1) School food authorities that operate the Program, and operate more than one child nutrition program under a single State agency, must use a common claim form (as provided by the State agency) for claiming reimbursement for meals served under those programs.

(2) No reimbursement may be issued until the sponsor certifies that it operated all sites for which it is approved and that there has been no significant change in its projected expenses since its preceding claim and, for a sponsor receiving an advance payment for only one month, that there has been no significant change in its projected expenses since its initial advance payment.

(3) Sponsors must submit a monthly claim or a combined claim within 60 days of the last day of operation. Sponsors may not submit a combined claim for meal reimbursements that crosses fiscal years. In addition, State agencies must ensure that the correct reimbursement rates are applied for meals claimed for months when different reimbursement rates are in effect. With approval from the State agency, sponsors have the flexibility to combine the claim for reimbursement in the following ways:

- (i) For 10 operating days or less in their initial month of operations with the claim for the subsequent month;
 - (ii) For 10 operating days or less in their final month of operations with the claim for the preceding month; or
 - (iii) For 3 consecutive months, as long as this combined claim only includes 10 operating days or less from each of the first and last months of program operations.
- (4) The State agency shall forward reimbursements within 45 days of receiving valid claims. If a claim is incomplete or invalid, the State agency shall return the claim to the sponsor within 30 days with an explanation of the reason for disapproval. If the sponsor submits a revised claim, final action shall be completed within 45 days of receipt.
- (5) Claims for reimbursement shall report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Reports of Summer Food Service Program Operations required under §225.8(b). In submitting a claim for reimbursement, each sponsor shall certify that the claim is correct and that records are available to support this claim. Failure to maintain such records may be grounds for denial of reimbursement for meals served claimed during the period covered by the records in question. The costs of meals served to adults performing necessary food service labor may be included in the claim. Under no circumstances may a sponsor claim the cost of any disallowed meals as operating costs.
- (6) A final Claim for Reimbursement shall be postmarked or submitted to the State agency not later than 60 days after the last day of the month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not filed within the 60 day deadline shall not be paid with Program funds unless FNS determines that an exception should be granted. The

State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the month covered by the claim and are reflected in the final Program Operations Report (FNS-418). Upward adjustments in Program funds claimed which are not reflected in the final FNS-418 for the month covered by the claim cannot be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(7) Payments to a sponsor must equal the amount derived by multiplying the number of eligible meals, by type, actually served under the sponsor's program to eligible children by the current applicable reimbursement rate for each meal type. Sponsors must be eligible to receive additional reimbursement for each meal served to participating children at rural or self-preparation sites.

(8) On each January 1, or as soon thereafter or as practicable, FNS will publish a notice in the Federal Register announcing any adjustment to the reimbursement rates described in paragraph (d)(7) of this section. Adjustments will be based upon changes in the series for food away from home of the Consumer Price Index (CPI) for all urban consumers since the establishment of the rates. Higher rates will be established for Alaska and Hawaii, based on the CPI for those States.

(9) Sponsors of camps shall be reimbursed only for meals served to children in camps whose eligibility for Program meals is documented. Sponsors of NYSP sites shall only claim reimbursement for meals served to children enrolled in the NYSP.

(10) If a State agency has reason to believe that a sponsor or food service management company has engaged in unlawful acts in connection with Program operations, evidence found in audits, reviews, or investigations shall be a basis for nonpayment of the applicable sponsor's claims for reimbursement.

* * * * *

(g) Unused reimbursement. If a sponsor receives more reimbursement than expended on allowable costs, the sponsor should use this unused reimbursement to improve the meal service or management of the Program. Unused reimbursement remaining at the end of the Program year must be used to pay allowable costs of other Child Nutrition Programs or for SFSP operations the following Program year.

(1) If a sponsor does not return to participate in the Program the following year and does not operate any other Child Nutrition Programs, the sponsor is not required to return the unused reimbursement to the State agency.

(2) [Reserved]

8. In §225.11, add paragraph (g) to read as follows:

§225.11 Corrective action procedures.

* * * * *

(g) Technical assistance for improved meal service. If the State agency finds that a sponsor is operating a program with poor quality meal service and is operating below the reimbursement

level, the State agency should provide technical assistance to the sponsor to improve the meal service.

9. In §225.12, revise the second sentence of paragraph (a) to read as follows:

§225.12 Claims against sponsors.

(a) * * * State agencies shall consider claims for reimbursement not properly payable if a sponsor's records do not support all meals claimed and include all costs associated with the Program sufficient to justify that reimbursements were spent only on allowable Child Nutrition Program costs. * * *

* * * * *

10. In § 225.13, revise paragraph (b)(1) to read as follows:

§ 225.13 Appeal procedures.

* * * * *

(b) * * *

(1) The sponsor or food service management company be advised in writing of the grounds upon which the State agency based the action. The notice of action shall also state that the sponsor or food service management company has the right to appeal the State's action. The notice is considered to be received by the sponsor or food service management company when it is delivered by certified mail, return receipt (or the equivalent private delivery service), by facsimile, or by e-mail. If the notice is undeliverable, it is considered to be received by the sponsor or food service management company five days after being sent to the addressee's last known mailing address, facsimile number, or e-mail address;

* * * * *

11. In §225.14, revise paragraphs (d)(3) introductory text and (d)(3)(i) to read as follows:

§ 225.14 Requirements for sponsor participation.

* * * * *

(d) * * *

(3) Sponsors which are units of local, municipal, county, or State government, and sponsors which are private nonprofit organizations, will only be approved to administer the Program at sites where they have administrative oversight. Administrative oversight means that the sponsor shall be responsible for:

(i) Maintaining contact with meal service staff, ensuring that there is adequately trained meal service staff on site, monitoring the meal service throughout the period of Program participation, and terminating meal service at a site if staff fail to comply with Program regulations; and

* * * * *

12. In §225.15:

a. Add paragraph (a)(4);

b. In paragraph (b)(3), remove the term “§225.9(d)(4)” and add in its place the term “§225.9(d)(5)”; and

c. Revise the first sentence of paragraph (c)(1), the second sentence of paragraph (m)(4) introductory text, and paragraphs (m)(4)(xii) and (m)(5) and (6).

The addition and revisions read as follows:

§ 225.15 Management responsibilities of sponsors.

(a) * * *

(4) Sponsors must maintain documentation of a nonprofit food service including copies of all revenues received and expenses paid from the nonprofit food service account. Program reimbursements and expenditures may be included in a single nonprofit food service account with funds from any other Child Nutrition Programs authorized under the Richard B. Russell National School Lunch Act or the Child Nutrition Act of 1966, except the Special Supplemental Nutrition Program for Women, Infants, and Children. All Program reimbursement funds must be used solely for the conduct of the nonprofit food service operation. The net cash resources of the nonprofit food service of each sponsor participating in the Program may not exceed one month's average expenditures for sponsors operating only during the summer months and three months' average expenditures for sponsors operating Child Nutrition Programs throughout the year. State agency approval shall be required for net cash resources in excess of the requirements set forth in this paragraph (a)(4). Sponsors shall monitor Program costs and, in the event that net cash resources exceed the requirements outlined, take action to improve the meal service or other aspects of the Program.

* * * * *

(c) * * *

(1) Sponsors shall maintain accurate records justifying all meals claimed and documenting that all Program funds were spent only on allowable Child Nutrition Program costs. * * *

* * * * *

(m) * * *

(4) * * * Sponsors that are schools or school food authorities and have an exclusive contract with a food service management company for year-round service, and sponsors whose total contracts with food service management companies will not exceed the simplified acquisition

threshold in 2 CFR part 200, as applicable, shall not be required to comply with these procedures. * * *

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(xii) All bids in an amount which exceeds the lowest bid and all bids totaling the amount specified in the small purchase threshold in 2 CFR part 200, as applicable, or more are submitted to the State agency for approval before acceptance. State agencies shall respond to a request for approval of such bids within 5 working days of receipt.

(5) Each food service management company which submits a bid exceeding the simplified acquisition threshold in 2 CFR part 200, as applicable, shall obtain a bid bond in an amount not less than 5 percent nor more than 10 percent, as determined by the sponsor, of the value of the contract for which the bid is made. A copy of the bid bond shall accompany each bid.

(6) Each food service management company which enters into a food service contract exceeding the small purchase threshold in 2 CFR part 200, as applicable, with a sponsor shall obtain a performance bond in an amount not less than 10 percent no more than 25 percent of the value of the contract for which the bid is made, as determined by the State agency. Any food service management company which enters into more than one contract with any one sponsor shall obtain a performance bond covering all contracts if the aggregate amount of the contracts exceeds the simplified acquisition threshold in 2 CFR part 200, as applicable. Sponsors shall require the food service management company to furnish a copy of the performance bond within ten days of the awarding of the contract.

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13. In §225.17, add paragraph (f) to read as follows:

§225.17 Procurement standards.

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(f) All contracts in excess of \$10,000 must contain a clause allowing termination for cause or for convenience by the sponsor including the manner by which it will be effected and the basis for settlement.

Dated: May 16, 2018.

Brandon Lipps,
Administrator,
Food and Nutrition Service.

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